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In The

Supreme Court of the United States

UNITED TRANSPORTATION UNION,
LOCAL 60, DONALD J. BOGEN, AND
UNITED TRANSPORTATION UNION,

Petitioners,

v.

EUGENE RUOCCHIO, AND
ROBERT A. D'ANGIOLILLO,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

(1) Whether the opinion below has significantly altered the well-established equation for resolving free speech issues by creating a new form of protected speech which was heretofore clearly and unmistakably unprotected.

(2) Whether the First Amendment "chilling effect" theory can be properly engrafted onto Title I of the Labor Management Reporting and Disclosure Act given the "reasonable rule" *proviso* of Title I.

PARTIES TO THE PROCEEDINGS BELOW

Eugene Ruocchio and Robert A. D'Angiolillo

Plaintiffs-Appellants

United Transportation Union, Local 60,
Donald J. Bogen, and
United Transportation Union

Defendants-Appellees

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PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE SUPREME COURT:

Petitioners United Transportation Union Local 60, Donald J. Bogen, and United Transportation Union respectfully request that the Court grant their Petition for a Writ of Certiorari.

OPINIONS BELOW

On March 2, 1998, the United States District Court for the District of New Jersey in *Ruocchio et al. v. United Transportation Union et al.*, Civil Action No. 97-5732 (NHP) granted Defendants' (hereinafter "UTU") motion to dismiss Plaintiffs' (hereinafter "Ruocchio") application for a preliminary injunction, but retained jurisdiction pending the resolution of the internal union trial (Appendix at 46-49, hereinafter "A."). After resolution of the internal procedure in Ruocchio's favor, on July 8, 1998, the district court dismissed Ruocchio's renewed motion for preliminary injunction and summary judgment finding that no case or controversy existed (A. 50).

On August 3, 1998, the district court denied Ruocchio's petition for reconsideration (A. 51-52). Ruocchio appealed this dismissal on August 19, 1998 (C.A. No. 98-6281).

On September 11, 1998, the district court denied Ruocchio's application for an award of attorneys' fees (A. 53-54). Ruocchio appealed this decision on October 2, 1998 (C.A. No. 98-6363).

On June 23, 1993, the United States Court of Appeals for the Third Circuit issued its decision, by a 2 to 1 vote, reversing the district court's determination that the matter was moot and vacating the district court's denial of attorneys' fees (A. 1-45).

JURISDICTION

The UTU filed a timely Petition for Rehearing and Suggestion for Rehearing *En Banc*. On August 16, 1999, the appellate court denied that petition, though one justice would have granted it (A. 55-56). This Petition for Writ of *Certioriari* is filed within 90 days of the denial of the Petition for Rehearing. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech. . . .

Section 101(a)(2) of the Labor Management Reporting and Disclosure Act, 29 U.S.C. § 411(a)(2) (hereinafter "LMRDA"), provides, in pertinent part:

> Every member of any labor organization shall have the right . . . to express views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon

any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: Provided, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

STATEMENT OF THE CASE

UTU is a labor organization and Ruocchio is an officer and the treasurer for UTU Local 60 (A. 3). In 1997, the local moved their headquarters from Newark, New Jersey to Summit, New Jersey. The office secretary, Susan Bogen, wife of UTU General Chairperson Dan Bogen, made arrangements with the Vernay Moving company to conduct the move (A. 58). The price quote was $125.00 per hour and the estimated time to complete the move was 10 hours (*Id.*). According to the arrangement, a check for $1,250.00 was paid to Vernay prior to the move (*Id.*). The complete move however, only took nine hours, and Vernay refunded $125.00 by check made out to Mrs. Bogen (A. 3, 58). Mrs. Bogen endorsed it and it was given to Ruocchio to deposit. Ruocchio, however, returned the check claiming he could not deposit it (A. 3, 58).

Mrs. Bogen returned the check to Vernay, who issued another check for $125.00 made out to Local 60 (A. 58-59). Despite the fact that both checks were for the exact same amount, and for reasons only known to himself, Ruocchio

wrote a letter on September 15, 1997 to Vice General Chairperson R. B. Hicks which contained the following:

> Finally, over a month ago I had received a refund check from the Vernay Company for which I returned as a result of it being rejected from the bank as a third party check. *I have since received another check from the same company, however, the amount was drastically reduced with no explanation*. Please advise why this has happened and when I am to expect the additional monies owed to our members.

(emphasis added) (A. 4). At the September 28, 1997 meeting, this error was pointed out to Ruocchio, who agreed he would print a retraction (A. 4, 59). However, when no retraction was forthcoming, Chairperson Dan Bogen charged Ruocchio with violating Article 78 of the UTU Constitution (A. 4, 59).[1]

At the October 26, 1997 meeting, Ruocchio was temporarily removed from office pending an internal trial. Prior to the internal trial, Ruocchio filed suit alleging that UTU violated the free speech provision of the LMRDA, 29 U.S.C. § 411(a)(2), and sought injunctive and declaratory relief, monetary damages, and attorneys' fees. The district court granted UTU's motion to dismiss, but retained jurisdiction of the matter pending resolution of the internal union process (A. 10, 48-49).

On March 30, 1998, the union trial was finally held and the board issued its decision on April 10, 1998, finding that Ruocchio had violated Article 78 (A. 10).

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[1] Article 78 prohibits willfully circularizing untrue statements (A. 4, 26).

On May 30, 1998, Ruocchio appealed to the International President, who on June 10, 1998, reversed the trial board finding that there was insufficient evidence of willful conduct, and directing that Ruocchio be reinstated to his position as Treasurer (A. 10).

Despite this, Ruocchio renewed his motion for a preliminary injunction and for summary judgment. The district court dismissed the complaint finding that no case or controversy was now extant. Ruocchio filed a motion for reconsideration which was denied on July 30, 1998 (A. 51-52). Ruocchio appealed.

SUMMARY OF ARGUMENT

The Third Circuit's opinion has drastically changed the equation for resolving free speech issues by creating a new form of protected speech, which heretofore, was clearly and unmistakably unprotected. Indeed, the majority opinion permits a union treasurer, an officer with a statutorily imposed fiduciary duty, to willfully engage in deceit concerning his union's finances under the guise of free speech.

Although the First Amendment cuts a wide path for free speech, it does have limits concerning deliberate and calculated deceit. *See NY Times v. Sullivan*, 376 U.S. 254 (1964). The court below ignores this well-settled principle instead removing any and all limits on speech.

Furthermore, Title I of the LMRDA, which is modeled after the First Amendment, but is quite clearly narrower, provides that speech may be limited by "reasonable

rules." 29 U.S.C. § 411(a)(2) *Proviso; United Steelworkers v. Sadlowski*, 457 U.S. 102 (1982). Here, the court ignored the plain and direct language of the statute to create a new type of protected speech, essentially reading the *proviso* out of the statute.

The court has taken it upon itself to ignore First Amendment precedent, and Title I and Title V of the LMRDA, to grant protection to speech which has never been protected.

ARGUMENT

The appellate court correctly notes that this case presents a situation where "First Amendment principles intersect with concerns particular to union speech issues in a way that has, historically, caused Congress and the federal courts to proceed with special care" (A. 14). Here, unfortunately, the court did not act with care and has distorted the traditional and well established equation in First Amendment issues. The court below has essentially disregarded the parameters of the First Amendment, as well as the LMRDA, 29 U.S.C. § 401 *et seq.*, and established a rule that a treasurer, who has a fiduciary duty to the union and the members with regard to union finances, can lie about those finances and then run for cover behind the free speech provisions contained in the LMRDA. Such a holding stands free speech principles on their collective heads and extends free speech beyond any imaginable boundary envisioned by the founding fathers, causing even the rethinking of Title 18.

I. THE MAJORITY OPINION BELOW CHANGES WELL-SETTLED FREE SPEECH PRINCIPLES PROTECTING SPEECH NOT HERETOFORE PROTECTED

The majority's characterization of such speech as "protected" stretches Title I of the LMRDA and the First Amendment beyond all recognizable boundaries. Essentially, the decision changes the basic equation established for free speech by allowing a person to yell "fire" in a crowded theater, or more to the point here, for a union treasurer to yell "thief" when he knows there is none. What the majority has done is to exceed its jurisdictional powers and create a new form of protected speech.

Title I of the LMRDA, known as the union *members'* "Bill of Rights," was modeled after the Bill of Rights, and § 101(a)(2) of Title I, 29 U.S.C. § 411(a)(2), was specifically based upon the First Amendment. *Reed v. United Transportation Union,* 438 U.S. 319, 325 (1989) citing *United Steelworkers v. Sadlowski,* 457 U.S. 102 (1982). This provision, just as the First Amendment, was to guarantee the right of union *members* to speak freely and discuss union issues to promote union democracy.

Initially, it is without dispute that the First Amendment forms the boundary upon which Title I must fit. However, even under the First Amendment, speech is not unlimitedly free. Restrictions with regard to defamation, perjury and other criminal statutes draw a line at what is protected and unprotected speech. *See e.g., NY Times v. Sullivan,* 376 U.S. 254 (1964); *Garrison v. State of Louisiana,* 379 U.S. 64, 75 (1964) ("The knowingly false statement and the false statement made with reckless disregard of

the truth, do not enjoy constitutional protection."); *Gerte v. Robert Welch,* 418 U.S. 323 (1974); *Haynes v. Alfred A. Dropf,* 8 F.3d 1222, 1228 (7th Cir. 1993); *Weldy v. Piedmont Airlines,* 985 F.2d 57 (2nd Cir. 1993). In order for society, any society, to function, a premium is placed on truth-telling and penalties are imposed for lying. *See Jones v. Clinton,* 36 F.Supp.2d 1718, 1130-31 (E.D. Ark. 1999) "Deliberately telling a lie or circularizing an untruth in the general community is neither protected nor acceptable in our society" (A. 32). As pointed out by the dissent, Article 78 only prohibits the *willful* circulating of untrue statements, which is the equivalent of the *NY Times v. Sullivan* standard and does not infringe on any protected speech. Indeed, it requires nothing more than what is expected of society in general. This Court itself has noted:

> [T]he most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth. But it must be emphasized that malicious libel enjoys no constitutional protection in any context. After all, the labor movement has grown up and must assume ordinary responsibilities. *The malicious utterance of defamatory statements in any form cannot be condoned, and unions should adopt procedures calculated to prevent such abuses.*

(emphasis added) *Linn v. United Plant Guard Workers,* 383 U.S. 53, 63 (1966). Although UTU took this directive to heart, the court below ignored it.

The majority opinion erases well-settled free speech principles and makes Title I broader than the Constitution. Such an approach is beyond the jurisdictional limit of any Article III court. Courts simply cannot go beyond

the parameters established by the Constitution. The majority now establishes that the malicious utterances of defamatory statements, by a union's financial officer with regard to union money, is now protected. What had been well-settled since *NY Times v. Sullivan*, and its progeny, has now become unsettled. The majority opinion is not only contrary to the First Amendment, but it expands § 101(a)(2) beyond its limited scope and purpose.

Indeed, while the majority complains that Article 78's "willful untruth" is too vague to be enforceable, it is the majority that attempts to impose the amorphous "chilling effect" standard without any evidence of any harm. Ruocchio was not affected in his membership, his ability to participate as a member, to speak up, to vote, or dissent. Rather, the majority's attempted application of "chilling" will essentially make *any* union rule invalid because of some potential effect it may have on some member's speech. Such a rule was never part of Title I and is directly contrary to the very plain and specific language of the Act.

As noted, while the First Amendment provided the footprint for § 101(a)(1) it is not a mirror image of the First Amendment. Section 101(a)(2) does wear a much narrower shoe.

> As the Supreme Court pointed out in *United Steelworkers v. Sadlowski*, 457 U.S. 102, 111, 102 S.Ct. 2339, 2345, 72 L.Ed.2d 707 (1982), the statute offers a *considerably narrower protection to speech than does the First Amendment*, because speech *can be impaired by union rules if they are reasonable*.

Massey v. Inland Boatmens' Union, 886 F.2d 1188, 1190 (9th Cir. 1989). Thus, not only is § 101(a)(2) limited by the same boundary as the First Amendment, it has its own internal limit imposed by Congress. Section 101(a)(2) specifically states:

> [*N*]*othing* herein shall be construed to *impair the right* of a labor organization *to adopt and enforce reasonable rules* as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

(emphasis added) 29 U.S.C. § 411(a)(2).

> This history reveals that Congress modeled Title I after the Bill of Rights, and that legislators intended § 101(a)(2) to restate a principal First Amendment value – the right to speak one's mind without fear of reprisal. However, there is absolutely no indication that Congress intended the scope of § 101(a)(2) to be identical to the scope of the First Amendment. Rather, Congress' decision to include a proviso covering "reasonable" rules refutes that proposition. First Amendment freedoms may not be infringed absent a compelling governmental interest. Even then, any government regulation must be carefully tailored, so that rights are not needlessly impaired. *Brown v. Hartlage*, 456 U.S. 45, 53-54, 71 L.Ed.2d 732, 102 S.Ct. 1523 (1982). *Union rules, by contrast, are valid under § 101(a)(2) so long as they are reasonable;* they need not pass the stringent tests applied in the First amendment context.

Sadlowski, 457 U.S. at 111. As the dissent below noted, Article 78 is extremely reasonable. It only requires what society in general requires: no malicious utterances of defamatory statements.

II. THE MAJORITY OPINION IS IN DIRECT CONFLICT WITH AN OPINION OF THIS COURT.

Not only does the majority opinion set strange and new free speech boundaries, it is contrary to this Court's precedent. In *United Steelworkers v. Sadlowski*, 457 U.S. 102 (1982), this Court firmly established that Title I's free speech provisions were not co-extensive with the First Amendment, and that they were, indeed, narrower. In *Sadlowski*, the union had enacted a rule which prohibited candidates for union office from receiving any outside money. While such a restriction may not have passed constitutional muster, it was clearly reasonable and thus protected under the LMRDA.

UTU's Article 78 is indeed similar to the reasonable rule in *Sadlowski*. There, the rationale was to prohibit outside influences in union elections. While such a rule is without doubt a limit on speech, the court found it was reasonable. There was no need to look to the First Amendment, or "chilling effect". The court noted that the only question that need be asked was whether the union's rule was reasonable.

Here, Article 78 is no less a reasonable rule than that in *Sadlowski*. It prohibits malicious lies from being circulated. It prohibits no other type of speech, nor infringes on any protected right. In this situation, it is used to prohibit a union's treasurer from lying about a union's

finances. What rule could be more reasonable? Indeed, is this same prohibition not required by Title V?

Title V, 29 U.S.C. § 502 *et seq.*, imposes a fiduciary obligation on union officers, especially financial officers, as was Ruocchio, with regard to union finances. Accordingly, while Ruocchio may be free to speak his mind as a union member about sum and substance, as the treasurer, he must scrupulously guard his comments with regard to union finances. The Act itself imposes upon him a duty to be honest and forthright in all dealings concerning union finances. Yet, the majority below simply ignores this imposing duty and permits the treasurer to hide under the guise of free speech. Such a position would lead to questioning Title 18. Furthermore, as noted above, such language is prohibited in general society, which has a broader constitutional protection for speech.

Analytically, *Sadlowski* and the present case are indistinguishable. In *Sadlowski* this Court made quite clear that Title I is not unlimited and is properly restricted by reasonable rules. Here, this rule simply attempts to make sure that incorrect information is not being used to willfully misrepresent or deceive. Such a rule, when applied to the chief financial officer regarding a matter of union finances, is eminently reasonable.

Lastly, even the majority admits that Title I protects only the union-member relationship, and that it does not extend any protection to officers. See Slip. Op. at 6 n.5; *Harrison v. Local 54, AFSMCE*, 518 F.2d 1276, 1281 (3rd Cir. 1975); *Martire v. Laborers' Local Union 1058*, 410 F.2d 32, 35 (3rd Cir. 1962); *Airline Steward and Stewardess Assoc. v. Trans. Workers Union*, 334 F.2d 805 (7th Cir. 1964) (removal

of officer for deceit concerning union funds does not violate Title I).

Here, Ruocchio was acting in his role as treasurer, not in his status as a member. No membership right of Ruocchio was affected. He was still free to attend meetings, make his views known and vote on any matter. Again, even though the majority recognizes the limitation of Title I and its inapplicability to officers, the majority nevertheless extends Title I beyond its dictated limit.

III. CONCLUSION

As is clear, while Title I favors full and robust union speech, *all* speech is not protected. Title I is not a *carte blanche* invitation to lie. Such intentional disregard for the truth has never been protected under the First Amendment or Title I. *See Linn v. United Plant Guards,* 383 U.S. 53, 62-63 (1966). A court cannot exceed its jurisdiction and go beyond the constitution to create a new category of speech which has heretofore previously been unprotected.

The majority opinion here has significantly altered the proper equation for resolving free speech issues and UTU requests that the Court grant its petition for a *writ* to correct this decision.

Respectfully submitted,

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Filed June 23, 1999

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 98-6281 & 98-6363

EUGENE RUOCCHIO;
ROBERT A. D'ANGIOLILLO,
Appellants

v.

UNITED TRANSPORTATION UNION, LOCAL 60;
DONALD J. BOGEN (Dan);
UNITED TRANSPORTATION UNION

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civl No. 97-cv-5732)
(District Court Judge: Honorable Nicholas H. Politan)

Argued: March 2, 1999

Before: STAPLETON, RENDELL, and ALDISERT,
Circuit Judges

(Filed June 23, 1999)

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OPINION OF THE COURT

RENDELL, *Circuit Judge.*

Appellants Eugene Ruocchio and Robert A. D'Angiolillo, members of the United Transportation Union ("UTU"), appeal the District Court's dismissal of their action against appellee UTU and its local chapter and chairperson. Ruocchio was suspended from his position as treasurer of the local chapter, UTU Local 60, when he was charged with "willfully circularizing untrue statements" in violation of Article 78 of the UTU constitution. Ruocchio filed suit against the UTU, Local 60, and Donald Bogen, the General Chairperson of Local 60, alleging that the charges against him violated Title I of the Labor-Management Reporting and Disclosure Act ("LMRDA"), seeking reinstatement to his position, and requesting various forms of injunctive and declaratory relief, as well as money damages and attorney's fees. The District Court, while retaining jurisdiction, determined not to proceed to

entertain the action until after the union's internal procedure was complete. Although the union Trial Board found that Ruocchio had violated Article 78 and removed him from office, its ruling was overturned by the UTU's International President during the internal union appeals process and Ruocchio was reinstated as treasurer. The District Court then dismissed Ruocchio's action as moot, finding that, in light of Ruocchio's reinstatement as treasurer, no case or controversy existed. Ruocchio filed the instant appeal. We find that Ruocchio's complaint is not moot, and remand to the District Court for further proceedings in light of this opinion.

I.

Eugene Ruocchio and Robert A. D'Angiolillo are members of the UTU and its local chapter, UTU Local 60. Ruocchio also served as treasurer of Local 60, having been elected with support from D'Angiolillo. As treasurer, Ruocchio was responsible for depositing a refund check for overpayment Local 60 received from Vernay Moving, Inc., a moving company that had moved Local 60 into new offices. Ruocchio claims that he was unable to deposit Vernay's original refund check, dated May 28, 1997, because it was not made out to the union, but to Local 60's secretary, Susan Bogen, who also is the wife of Local 60's General Chairperson, Donald Bogen. To resolve this problem, Ruocchio requested Susan Bogen to ask Vernay to prepare another check, this time made out to Local 60. The record reflects that Susan Bogen did so, in a letter to Vernay dated July 28, 1997.

Vernay sent a new check to Susan Bogen, made out to the union, and it was forwarded to Ruocchio. On September 15, 1997, Ruocchio addressed a letter to Local 60's Vice Chairperson Ronald B. Hicks,[1] addressing various union financial matters, including the check from Vernay. Ruocchio noted:

> Finally, over a month ago I had received a refund check from the VERNAY Company for which I returned as a result of it being rejected from the bank as a third party check. I have since received another check from the same company, however the amount is drastically reduced with no explanation. Please advise why this has happened and when I am to expect the additional monies owed to our members.

Copies of the checks issued to Susan Bogen and the union show that the amount of both checks was the same – $125. Thus, Ruocchio's representation that the amount of the new check was "drastically reduced" from the prior one was inaccurate.

The minutes of the September 28th meeting reflect that the inaccuracy of the representation in Ruocchio's letter was discussed, and that Ruocchio agreed to print a retraction, although no retraction was issued. In a letter dated October 14, 1997, General Chairperson Donald Bogen charged Ruocchio with a violation of Article 78 of the union constitution, which provides: "A member who willfully circularizes untrue statements shall be expelled

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[1] Copies of the letter were sent to "S. Padelski, L #60" and "B. Walsh, Sec. #60." The union Trial Board noted that the letter was read at the monthly union meeting on September 28, 1997 during Ruocchio's treasurer's report.

from membership in the United Transportation Union if, after being charged and tried under the trial provisions of this Constitution, his/her guilt has been established." UTU Constitution, Art. 78, lines 1-4. Bogen, referencing the excerpt from Ruocchio's letter reproduced above, noted:

> "This statement is a lie, both checks were exactly for the same amount. . . . As you know, Susan Bogen my wife, is our office secretary and this is a direct affront to her character as she is the person who the original check was addressed to." At the next monthly union meeting, on October 26, 1997, Ruocchio was removed from office pending trial.[2] The trial was originally set for November 21, 1997.

Prior to the original trial date, in addition to appealing unsuccessfully to the union's International President for relief,[3] Ruocchio filed suit in the District Court against the UTU, Local 60, and Donald Bogen. Ruocchio alleged that Bogen had filed the charge against him in retaliation for his political opposition in the November 1996 union elections. Ruocchio averred in his complaint that:

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[2] It appears that the formal charge was not forwarded to Ruocchio until October 31, 1997.

[3] In three letters, two dated November 7, 1997, and one dated November 11, 1997, Ruocchio asked the International President for a ruling that the charge against him violated the LMRDA and the UTU constitution, and complained that the Trial Board scheduled to preside at his hearing was politically partisan and biased against him. The International President refused to intervene while the Trial Board hearing and decision were pending.

> Ruocchio is politically opposed to the Bogan [sic] administration. He campaigned against them in the last election and ran against their hand-picked candidates in the previous elections; further, he has voiced his opposition to the policies of the Bogan administration.
>
> * * * *
>
> Bogan and his political allies are using internal charges to punish their political opponents.

Complaint, ¶¶ 10, 13. Additionally, Ruocchio elaborated on his allegations in a second affidavit, filed about two months after the complaint was filed:

> In the last officer elections conducted by UTU Local 60 in November of 1996, I ran on a slate running in opposition to the slate supported by the Local's principal officer, General Chairman Don Bogen, who considers me to be his arch political enemy – the proverbial camel who got its nose under Bogen's tent.
>
> * * * *
>
> For whatever reasons, Don Bogen reportedly took great umbrage, perhaps because my question concerning the Vernay reimbursement allegedly constituted "a direct affront to [his wife's] character," . . . but more likely because he was hunting for some excuse to remove a "dissident" from his Executive Board otherwise comprised of loyalists or people he can control one way or another.
>
> In any event, the very first notice I had that my simple, honestly intended question had caused a political aneurysm was when, at the next general membership meeting on October 26, 1997, I

> was brought up on internal union charges, effectively tried before those members who happened to be in attendance, and removed from the office to which I had been elected by the entire membership. In essence, I was caught totally off balance by Bogen and his lynch mob. I now understand that the event had been carefully scripted for the purpose of eliminating a political opponent.

Second Affidavit of Eugene Ruocchio, ¶¶ 2, 8-9 (alteration in original).

Ruocchio's complaint alleged various violations of Title I of the LMRDA, 29 U.S.C. § 411. Ruocchio claimed that defendants violated his right to free speech under § 411(a)(2) of the Act,[4] and that his suspension from office pending trial violated § 411(a)(5), which provides that members will be afforded certain procedural safeguards

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[4] Section 411(a)(2) provides:

> Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: Provided, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

before being "fined, suspended, expelled, or otherwise disciplined."[5] D'Angiolillo alleged that Ruocchio's removal from office had deprived D'Angiolillo, who had voted for Ruocchio as treasurer, of his right to participate in the governance of the local union through a duly

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[5] We note that Ruocchio's § 411(a)(5) claim is not cognizable, since it is based on removal from office, not membership. In *Sheridan v. United Brotherhood of Carpenters & Joiners of America, Local No. 626*, 306 F.2d 152 (3d Cir. 1962), this Court held that removal from office did not constitute a form of discipline as that term was used in § 529 of Title 29. *See id.* at 156. Section 529 provides that "[i]t shall be unlawful for any labor organization . . . to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled under the provisions of [the LMRDA]." 29 U.S.C. § 529. We reached this conclusion because we understood § 529's enumeration of fine, suspension, and expulsion to "manifest an intention by Congress to protect members qua members. Removal from office, on the other hand, is a sanction that can be directed only against the limited group of members who happen to be officers." *Sheridan*, 306 F.2d at 156. Thus, we concluded that the plaintiff could not state a violation of § 529 based on his removal from office. Furthermore, we concluded that § 411 did not protect the plaintiff's status as an officer since the Bill of Rights contained therein repeatedly refers to the rights of members, not to the rights of officers or employees. *See id.*

In subsequent cases, we have held that § 411(a)(5) protects the union-member relationship, not the union-officer or union-employee relationship – both because of *Sheridan*'s specific holding regarding § 411 as a whole and because of the parallel language in § 411(a)(5) and § 529. *See Martire v. Laborers' Local Union 1058*, 410 F.2d 32, 35 (3d Cir. 1969) (holding that § 411(a)(5) did not afford a remedy for removal from office prior to expiration of term); *Harrison v. Local 54 of the Am. Fed'n of State, County & Mun. Employees*, 518 F.2d 1276, 1281 (3d Cir. 1975) (noting that the LMRDA does not provide relief for removal from office or for loss of income resulting therefrom).

elected representative and spokesperson in violation of § 411(a)(1).[6]

In addition to a request for money damages to compensate for loss due to Ruocchio's alleged improper removal, and for attorney's fees, plaintiffs also sought various forms of injunctive and declaratory relief. Ruocchio requested an injunction barring defendants from going forward with the trial against him, and reinstating him to his position as treasurer. The complaint also requested (1) declaratory relief that Article 78 is null and void; and (2) injunctive relief not only enjoining defendants from enforcing Article 78 and requiring they notify union members that Article 78 is no longer in force, but also enjoining defendants from retaliating against union members for exercising their rights under Title I of the LMRDA.

Prior to the union trial, which had been postponed from the originally scheduled November date, the District Court heard oral argument on Ruocchio's application

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[6] Only two charges listed in the "Causes of Action" section of the complaint refer specifically to D'Angiolillo: the § 411(a)(1) charge, and the § 411(a)(2) charge that Article 78 "infringes and chills the exercise of plaintiffs' free speech rights." The complaint's prayer for relief does not specify what, if any, relief D'Angiolillo is seeking; in fact, in requesting relief, it refers to "plaintiff" in the singular. We assume that D'Angiolillo intended that his claims be remedied by Ruocchio's reinstatement, and the other equitable and declaratory relief sought by Ruocchio as "plaintiff." We therefore discuss the relief that Ruocchio seeks, and do not address separately any relief sought by D'Angiolillo. This does not mean that D'Angiolillo could not seek to clarify his position in this regard on remand to the District Court.

for a preliminary injunction, but granted defendants' motion to dismiss the application, while retaining jurisdiction over the matter pending the outcome of the internal union trial. The Court explained that it would "not interfere with the internal workings of the Union at this point in time." Nonetheless, the Court noted: "Though not making a determination one way or the other at this time, the Court is compelled to note that it has serious reservations as to the validity of Article 78."

The union trial was held on March 30, 1998, and, on April 10, 1998, the Trial Board ruled that Ruocchio had violated Article 78. On May 30, 1998, Ruocchio appealed this decision to the International President, who overturned the Trial Board and reinstated Ruocchio to his position as treasurer, stating:

> I have carefully reviewed the trial transcript, exhibits, and your appeal letter. After such review I have determined that the trial board failed to focus on charges brought and that the record as a whole does not present a violation of any willful circulization of untrue statements as contemplated by Article 78.

On July 13, 1998, in a letter addressed to Bogen (of which Ruocchio and other union officials received copies), the International President explained that, in overturning the Board's decision, he had not judged the propriety of Ruocchio's conduct, but had simply concluded that there was insufficient evidence of "willful" conduct on Ruocchio's part.[7]

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[7] The letter provided, in relevant part:

In considering the appeal, I am duty bound to focus on the precise charge brought, and particularly upon

Shortly thereafter, plaintiffs filed a renewed motion for a preliminary injunction and a motion for summary judgment before the District Court. On July 8, 1998, the District Court dismissed the complaint, finding that there was no case or controversy due to Ruocchio's reinstatement to his position as treasurer. Ruocchio filed a motion for reconsideration, which was denied on July 30, 1998. The District Court also denied Ruocchio's request for attorney's fees by letter order dated September 9, 1998, on the basis that Ruocchio was not a prevailing party in the litigation. The instant appeal followed.

We base our jurisdiction on 28 U.S.C. § 1291, which allows us to review final orders of the district courts. The District Court had jurisdiction over this matter pursuant to 28 U.S.C. § 1331. Our review of the District Court's determination that Ruocchio's action was moot is plenary.

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the "willfully" standard stated in Article 78 of the Constitution, especially where, as here, the free speech rights contained in Title I of the LMRDA limit application of Article 78 to narrow circumstances similar to the limitations the First Amendment to the U.S. Constitution places on defamation actions in some circumstances. In short, there was insufficient evidence of record that the clearly erroneous statement in the letter that was the focus of the charge made against Mr. Ruocchio had been made "willfully" as the courts would apply that term. I have no criticism of the action of the Trial Board in hearing this matter and making the determination they did. It was just a question of my obligation to construe our Constitution to make sure that its text and application would remain within the difficult boundaries of federal law.

See International Bhd. of Boilermakers v. Kelly, 815 F.2d 912, 914 (3d Cir. 1987).[8]

II.

Although the precise issue before us relates to mootness of the instant dispute, and whether plaintiff is entitled to relief, the issue is best couched in the following terms for our purposes: whether the decision of the dispute continues to be justified by sufficient prospect that it will have impact on the parties. *See* 13A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3533, at 212 (1984). We conclude that, in light of the unique considerations involved in the union speech context, and the facts averred in this case, it is likely that a decision in the

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[8] The plenary standard of review seems appropriate since mootness doctrine relates to courts' constitutional authority to hear a case; a court must dismiss a case as moot if there is no Article III case or controversy. However, mootness analysis often encompasses prudential considerations, in addition to the threshold constitutional dimension, that could be more appropriately reviewed for abuse of discretion. *See Kelly*, 815 F.2d at 915; *see also In re Continental Airlines*, 91 F.3d 553, 560 (3d Cir. 1996) (reviewing a mootness determination in the bankruptcy context for abuse of discretion, because it involved a discretionary balancing of equitable and prudential factors, rather than the limits of the federal courts' authority under Article III). In practice, courts frequently do not parse the two. *See Kelly*, 815 F.2d at 915. The District Court, while not specifically grounding its decision on the constitutional aspect of the mootness doctrine, noted that it was dismissing the case because "no case or controversy exists." Thus, it seems the plenary standard of review is particularly appropriate here, where the District Court has appeared to rely solely on constitutional grounds.

case will impact the parties notwithstanding Ruocchio's reinstatement. We will therefore remand to the District Court for a determination of the claims that should be decided, in light of this opinion.

As indicated above, plaintiff sought several types of relief: money damages; attorney's fees; a declaration that Article 78 is null and void; and injunctive relief, enjoining defendants from enforcing Article 78, requiring defendants to provide notice to union members that Article 78 is unenforceable, and prohibiting defendants from retaliating against union members in violation of their rights under Title I of the LMRDA.[9] The District Court held that the reinstatement rendered the entire case moot. However, a case may be moot as to one remedy, but not as to others.

Here there can be no question that Ruocchio's claim for monetary damages survives and is not moot. *See Sheet Metal Workers' Int'l Ass'n v. Lynn*, 488 U.S. 347, 354-55 (1989) (holding that an officer had stated a cause of action under § 411(a)(2) because retaliatory removal from office constituted a price paid for the exercise of his membership right of free speech). The District Court never addressed this claim, but we hold that on this basis alone the District Court must hear the case to determine Ruocchio's entitlement to damages. The question as to

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[9] Plaintiffs also requested injunctive relief prohibiting the union trial from going forward, and reinstating Ruocchio to his position as treasurer. These claims for relief are clearly moot, in light of the fact that the union trial has already taken place, and that Ruocchio has already been reinstated.

whether plaintiff continues to have a claim for declaratory and injunctive relief is a closer one. However, based on the allegations of plaintiff's complaint and his affidavit in this case, we have little difficulty in finding that these claims, too, are very much alive, and have not been rendered moot by Ruocchio's reinstatement. Ruocchio's complaint paints a picture of the union employing a provision of its constitution to silence speech in opposition to the union leadership. The entire check incident is averred to have been employed as a device to punish Ruocchio for his vocal support of others. Whether or not the union's International President ultimately reinstated Ruocchio to his office, his complaint is based on retaliation for speech protected by the LMRDA, and we view our decisions in *Mallick v. International Brotherhood of Electrical Workers*, 644 F.2d 228 (3d Cir. 1981) and *Semancik v. United Mine Workers of America District #5*, 466 F.2d 144 (3d Cir. 1972) as requiring that his claim for declaratory and injunctive relief be heard. We will also remand the decision regarding plaintiffs' entitlement to attorney's fees for further consideration.

III.

This appeal presents a situation in which First Amendment principles intersect with concerns particular to union speech issues in a way that has, historically, caused Congress and the federal courts to proceed with special care. Congress's commitment to providing special protection for free speech rights in the union context is illustrated by Title I of the LMRDA, commonly referred to as the LMRDA's "Bill of Rights." The courts have played a significant role in defining the contours of the LMRDA's

speech provisions, and have "shaped the Bill of Rights into a guarantee of union democracy, with the right of free speech enjoying a particularly favored position." *Fulton Lodge No. 2 of the Int'l Ass'n of Machinists & Aerospace Workers v. Nix*, 415 F.2d 212, 217 (5th Cir. 1969). In construing its terms, the Supreme Court has considered that the predecessor to the LMRDA's current Bill of Rights was adopted as an amendment on the Senate floor by legislators who "feared that the bill did not go far enough because it did not provide general protection to union members who spoke out against the union leadership." *United Steelworkers of Am. v. Sadlowski*, 457 U.S. 102, 109 (1982); *see also Sheet Metal Workers' Int'l Ass'n v. Lynn*, 488 U.S. 347, 352 (1989). The Court concluded that the legislative history revealed that Title I of the LMRDA was modeled after the Constitution's Bill of Rights, and was intended "to restate a principal First Amendment value – the right to speak one's mind without fear of reprisal." *Sadlowski*, 457 U.S. at 111 (finding, however, that the scope of § 411(a)(2) of the LMRDA is not identical to the scope of the First Amendment).

Violations of rights guaranteed by the LMRDA are of particular concern because discipline of one union member based on such a violation may deter other members from exercising their rights, thereby threatening the rights of all union members. *See Hall v. Cole*, 412 U.S. 1, 8 (1973). In *Hall*, the Court determined that courts had authority to award attorney's fees to successful LMRDA plaintiffs, observing that, "by vindicating his own right, the successful litigant dispels the 'chill' cast upon the rights of others." *Id.* at 8-9, 14. As the Second Circuit

Court of Appeals noted in *Salzhandler v. Caputo*, 316 F.2d 445 (2d Cir. 1963):

> The LMRDA of 1959 was designed to protect the rights of union members to discuss freely and criticize the management of their unions and the conduct of their officers. The legislative history and the extensive hearings which preceded the enactment of the statute abundantly evidence the intention of the Congress to prevent union officials from using their disciplinary powers to silence criticism and punish those who dare to question and complain.

Id. at 448-49. *Salzhandler* held that the protection afforded by the LMRDA was so broad that even libelous speech was protected. *See id.* at 450-51 (holding that libelous speech that may be the basis for a civil action may not be the basis for union discipline, because union "procedure is peculiarly unsuited for drawing the fine line between criticism and defamation"); *see also Gertz v. Welch*, 418 U.S. 323, 347 (1974) (finding, in the First Amendment context, that states may not impose liability for false and defamatory speech absent a showing of fault).[10] Courts

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[10] The dissent cites *Linn v. United Plant Guard Workers of America, Local 114*, 383 U.S. 53, 63 (1966), for the proposition that libelous statements of union members are not protected from union action. Although there is language in *Linn* suggesting that unions should adopt procedures proscribing libelous speech, *Linn* ultimately dealt with a *civil* action against libelous speech, not *union* action against libelous speech. *See id.* at 55. As noted above, *Salzhandler* distinguished between the two, finding that speech that may be the basis of a civil action might not be an appropriate basis for union action. *See Salzhandler*, 316 F.2d at 450-51. Thus, *Linn* is not inconsistent with *Salzhandler*'s conclusion that unions may not proscribe libelous speech.

have also held that the LMRDA provides them with broad discretion to fashion appropriate relief for LMRDA violations. *See Gartner v. Soloner*, 384 F.2d 348, 354-56 (3d Cir. 1967) (discussing courts' broad remedial power under the LMRDA, in determining that attorney's fees may be awarded under the statute).

Further, in light of the above concerns, courts have been expansive in their view of a litigant's standing to bring legal action in situations in which free speech rights are implicated. Cases addressing issues of standing in the free speech labor context – which mirror the same concerns that exist regarding mootness – have recognized that limitations on free speech rights can result in a "chilling effect" on others' exercise of those rights, and have taken a broad view of standing based on this prospect.[11] In *Nelson v. International Association of Bridge, Structural & Ornamental Iron Workers*, 680 F.Supp. 16 (D.D.C. 1988), the court looked to the First Amendment

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[11] Cases addressing standing are relevant to our inquiry because the question of standing "bears close affinity" to the question of mootness. *See Warth v. Seldin*, 422 U.S. 490, 499 n.10 (1975). Both standing and mootness involve the consideration of whether an Article III case or controversy exists. *See id.* at 498; *Kelly*, 815 F.2d at 914. In dismissing the instant case, the District Court equated mootness with the absence of a case or controversy. Mootness has been described as representing "a time dimension of standing, requiring that the interests originally sufficient to confer standing persist throughout the suit." WRIGHT ET AL., *supra*, § 3533.1, at 220. We adopted a similar view in *Artway v. Attorney General*, 81 F.3d 1235 (3d Cir. 1996), in which we explained that mootness "asks whether a party who has established standing has now lost it because the facts of her case have changed over time." *Id.* at 1246.

overbreadth doctrine in determining if plaintiffs had standing to challenge a union provision as violative of the LMRDA. *See id.* at 24. One of the plaintiffs had not even been charged under the provision, and simply alleged that his own interpretation of the broad provision induced him to remain silent. *See id.* at 23. Nonetheless, the court explained that, under the relaxed rules of standing applied in this context:

> Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the Court to refrain from constitutionally protected speech or expression.

Id. at 24 (quoting *Broadrick v. Oklahoma,* 413 U.S. 601, 612 (1973)). The court concluded that the plaintiffs had standing to challenge the section of the union constitution, because it was so "grossly overbroad," and "so plainly" violated the LMRDA that " 'no judicial prediction or assumption' is necessary to ascertain that free speech will be chilled," and denying plaintiffs standing would perpetuate the chilling effect on the rights of all union members. *Id.* at 25; *see also Virginia v. American Booksellers Ass'n,* 484 U.S. 383, 393 (1988) (plaintiffs had standing to raise a facial challenge to an allegedly speech-infringing statute before the statute had been enforced because they had alleged "an actual and well-founded fear" that the statute would be enforced against them, and "the alleged danger of this statute is, in large measure, one of self-

censorship; a harm that can be realized even without an actual prosecution").[12]

We have had occasion to endorse this expansive view of union speech rights, in *Mallick v. International Brotherhood of Electrical Workers*, 644 F.2d 228 (3d Cir. 1981) and *Semancik v. United Mine Workers of America District #5*, 466 F.2d 144 (3d Cir. 1972). In *Mallick*, plaintiff union members were "vocal and persistent critics" of union leadership who were charged with violating various provisions of the union constitution, including provisions similar to the one at issue in this case. *See Mallick*, 644 F.2d at 230-32. The provisions made punishable: "[p]ublishing or circulating among the membership, or among [local unions] false reports or misrepresentations," and "[s]landering or otherwise wronging a member of the [union] by any willful act or acts." *Id.* at 231 n.1. The penalties assessed for violations of these particular provisions were eventually reversed by the union's international representative, due to insufficient evidence that the statements at issue were untrue, much like the charges were reversed in the instant case. *See id.* at 232 & n.5. In addition to compensatory and punitive damages, plaintiffs sought declaratory and injunctive relief barring enforcement of the allegedly illegal union provisions under which they had been charged. *See id.* at 232. The district court determined that plaintiff union members

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[12] The dissent characterizes plaintiff's claim arising from the application of Article 78 to him as an "abstract" injury, rather than one that is "distinct" and "palpable." We submit, however, that in the context of union speech, a claim that rights have been chilled has been deemed anything but abstract. *See Mallick v. International Bhd. of Elec. Workers*, 644 F.2d at 235.

lacked standing to challenge the validity of union provisions that formed the basis for charges that had been overturned by the international representative. *See id.* at 233. We reversed. *See id.* at 236.

In holding that the district court erred in failing to consider plaintiffs' equitable claims based on these charges, we noted the "expansive protection" given to union members' speech rights. *See id.* at 235 ("The Bill of Rights section of the [LMRDA] is designed to foster democratic governance within labor unions, and to encourage members freely to dissent from the policies and administration of the leadership or to discuss openly those policies and practices."). Had the district court properly considered the broad protections afforded to speech under the LMRDA, and the unique nature of speech infringements, it would not have concluded that, because the charges were overturned on appeal, plaintiffs necessarily did not suffer an actionable injury. *See id.*

> Harm to free speech rights . . . is not measured solely in economic terms, nor must concrete punishment be meted out to confer standing to sue. The right to speak one's views freely is so fundamental that the spectre of punishment, or the uncertainty created by a vaguely worded prohibition of speech, is injurious as well.

Id. We noted that the mere fact that the members were charged, as well as the possibility of future charges based on the challenged prohibitions, could have a substantial chilling effect on plaintiffs' and other union members' exercise of their free speech rights: "The goal of union democracy, achieved through the expression of opposing viewpoints, would be difficult to realize if members felt

deterred from expressing their opinions by the prospect of disciplinary proceedings." *Id.* at 236. Accordingly, we remanded for the district court to consider whether the provisions at issue violated § 411 of the LMRDA. *See id.*[13]

In *Semancik*, we recognized the district courts' broad discretion to fashion remedies for speech violations in the union context, and determined that the district court properly entered a permanent injunction prohibiting enforcement of a union provision that violated the LMRDA, because the union provision was broad and ill-defined, and had been repeatedly utilized to stifle protected speech. *See Semancik*, 466 F.2d at 152-53, 156. In so doing, we rejected the defendants' argument that the district court was limited to granting individual injunctions on a case-by-case basis to union members who could show that their speech rights had been violated. We concluded that under § 412 of the LMRDA the district court's power to grant relief was not so circumscribed, and that § 412 afforded district courts the discretion to fashion whatever relief was appropriate to protect union members' rights, including injunctions. *See id.* at 155-56. We specifically stated that courts' "discretionary power is to be broadly construed to effectuate the purposes of the statute." *Id.* at 156. This provision, coupled with § 411(b) of the LMRDA, which provides that union provisions in violation of the LMRDA shall be "of no force or effect,"

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[13] While our dissenting colleague seeks to distinguish *Mallick* based on the actual injury in that case, our focus in *Mallick* was not on the extent of union reprisal but, rather, on the harm visited in non-economic terms via the chill on, and deterrence of, the right of expression. *See Mallick*, 644 F.2d at 235-36.

empowered the district court to enjoin permanently a union provision violative of the LMRDA. *See id.* at 155-56. Once again, we took into account the important consideration that union power is subject to restrictions in the face of the members' competing freedom of speech claim. *See id.* at 153 ("[C]ourts have responded by making clear that labor organizations properly exercise their disciplinary powers only over a limited area of proscribed conduct inimical to the union as an entity and collective bargaining mechanism. Unless statements fall into these categories, they are protected from union action even if libelous.").

Both *Mallick* and *Semancik* illustrate the broad protection the LMRDA affords speech rights in the union context, and demonstrate that we may view the harm caused by regulation of such speech somewhat differently from the harm or injury occurring in other contexts. Both cases also reflect the wide discretion granted to district courts so that they may fashion remedies that satisfy these concerns. These factors are present in the instant case, and lead us to the same conclusion that we reached in *Mallick* – that the District Court should have considered whether equitable and declaratory relief was appropriate. Ruocchio's reinstatement and the reversal of the charges against him no more automatically foreclose his rights to additional relief than the reversal of the charges did in *Mallick;* the remedies sought by Ruocchio of an injunction against enforcement of the constitutional provision, and declaration of its invalidity, may indeed retain sufficient utility to justify their implementation. In both of these cases, we reiterated in broad and expansive terms the

need for the courts to entertain, and enjoin, union exercise of power that chills speech protected by the LMRDA. To conclude, as the dissent does, that these important rulings do not support our conclusion is to turn our jurisprudence on its head.

Our dissenting colleague urges that our ruling opens the flood gates to union members' protests against valid union regulation based upon the "sole" "bald" allegation that their speech has been "chilled." Rather than take issue with this view, we embrace this characterization as a fair statement of what the law requires. Our jurisprudence compels us to give a union member the opportunity to protect his right to speak his views as legislatively mandated by § 411(a)(2) of the LMRDA. In so doing we suggest that the harm it seeks to avoid is very real, and the power it seeks to curtail can be wielded in ways not apparent on the face of a union constitution. *See Mallick*, 644 F.2d at 235; *Semancik*, 466 F.2d at 152.

We do not decide whether Ruocchio is *entitled* to declaratory and injunctive *relief*; we hold only that the claims do have vitality before the District Court. We note that by determining that these claims for relief are not moot, we have addressed the simplest part of the equation. Determining whether the conduct of the union actors, and/or the challenged constitutional provision itself, violate § 411(a)(2) of the LMRDA and, if so, what relief should be provided, are far more complicated inquiries. As this case was dismissed without the aid of any discovery, we cannot begin to address these issues and must entrust them to the District Court for resolution on remand.

We will also vacate the District Court's ruling denying plaintiffs' request for attorney's fees. To recover attorney's fees under the LMRDA, a claimant must be a prevailing party and his lawsuit must provide a common benefit to all union members. *See Pawlak v. Greenawalt*, 713 F.2d 972, 980 (3d Cir. 1983). The District Court found that Ruocchio could not recover attorney's fees because he did not technically prevail in the case before it. We view this decision as reflecting an inadequate inquiry into the factors set forth in *Pawlak*. On remand, the District Court will necessarily revisit its ruling based on the outcome of the monetary, equitable, and declaratory claims for relief it will now hear as discussed above, and in doing so, should reconsider the *Pawlak* factors. We note that, for purposes of *Pawlak*'s "prevailing party" requirement, Ruocchio need not obtain ultimate success in the form of a judgment in order to be entitled to attorney's fees. *See Baumgartner v. Harrisburg Housing Auth.*, 21 F.3d 541, 544 (3d Cir. 1994); *Brennan v. United Steelworkers of Am.*, 554 F.2d 586, 591 n.5 (3d Cir. 1977). Rather, if plaintiffs have been a "catalyst," so that defendants voluntarily ceased the behavior challenged by plaintiffs, plaintiffs can still be "prevailing parties" if they prove that the lawsuit was a material contributing factor in bringing about the desired relief. *See Baumgartner*, 21 F.3d at 544-45 (citing *Wheeler v. Towanda Area Sch. Dist.*, 950 F.2d 128, 132 (3d Cir. 1991)); *see also Riley v. McCarthy*, 723 F.Supp. 1521, 1522 (D.D.C. 1989) (finding that an LMRDA plaintiff is a "prevailing party" even absent judgment on the merits as long as the lawsuit was not frivolous, the plaintiff substantially obtained the relief sought, and the lawsuit was an important factor in obtaining that relief). Further,

plaintiffs may satisfy *Pawlak*'s common benefit requirement if, by vindicating their rights under the LMRDA, they have "dispelled the 'chill' cast upon the rights of all Union members and contributed to the preservation of union democracy." *Pawlak*, 713 F.2d at 980.

IV.

For all of the foregoing reasons, we will reverse the District Court's determination that plaintiffs' lawsuit was moot, vacate the District Court's denial of attorney's fees, and remand to the District Court for proceedings consistent with this opinion.

ALDISERT, *Circuit Judge*, dissenting.

The Supreme Court has consistently made clear that lies and willful defamation are not shielded by the expansive reach of the First Amendment. Yet, the majority suggests that a provision of a union constitution, which prohibits this same type of defamation, creates a chilling effect on speech sufficient to create a justiciable controversy in a case pursuant to the Labor-Management Reporting and Disclosure Act ("LMRDA"). This conclusion is unacceptable to me. I dissent.

This appeal requires us to decide whether the district court erred by dismissing Appellants' claims as moot after Eugene Ruocchio was reinstated to the office of treasurer of United Transportation Local #60 on June 10, 1998. Ruocchio was first suspended from that office on October 27, 1997, pending a trial board hearing on a

charge that he violated Article 78 of the Union Constitution, and was removed from office on April 10, 1998 after the board found him guilty. Article 78 provides:

> A member who willfully circularizes untrue statements shall be expelled from membership in the United Transportation Union if, after being charged and tried under the trial provisions of this Constitution, his/her guilt has been established.

App. at 39. Notwithstanding the mootness issue, critical to our ultimate decision is whether the mere accusation that a union member has violated Article 78, without proof that the member has been damaged by the accusation, is such an injury as to make out a justiciable case or controversy as a violation of the LMRDA, specifically 29 U.S.C. § 411(a)(2). The majority believes that an accusation is sufficient. I am unable to agree because, in my view, Appellants no longer have a case or controversy vesting the district court with jurisdiction. Accordingly, for reasons related to those expressed by the district court but with a somewhat different emphasis on the doctrine of justiciability, I would affirm the judgment of the district court.

I.

Article III of the Constitution confines the judicial power by extending it only to cases and controversies. " 'All of the doctrines that cluster about Article III – not only standing but mootness, ripeness, political question, and the like – relate in part, and in different though overlapping ways, to an idea, which is more than an intuition but less than a rigorous and explicit theory,

about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government.' " *Allen v. Wright*, 468 U.S. 737, 750 (1984) (quoting *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1178-1179 (D.C.Cir. 1982) (Bork, J., concurring)).

As early as 1937, the Court made clear that a genuine case or controversy is necessary for the federal courts to grant relief to litigants. *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 239-240 (1937) (interpreting the Declaratory Judgment Act). The court enunciated precepts that define "case or controversy":

> A "controversy" in this sense must be one that is appropriate for judicial determination. A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. It must be a real and substantive controversy admitting of specific relief through a decree of conclusive character, as distinguished from an opinion advising what a law would be upon a hypothetical state of facts.

Id. at 240-241 (citations omitted).

Thus, Article III requires a party seeking relief to allege personal injury that is fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief. *See Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982). The injury alleged must be distinct and palpable, *Gladstone, Realtors v. Village*

of Bellwood, 441 U.S. 91, 100 (1979), and not "abstract" or "conjectural" or "hypothetical," *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-102 (1983); *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974). In the absence of such an injury, the requirements of Article III are not satisfied and the district court does not have jurisdiction to entertain the action before it.

II.

As a threshold consideration, Appellants cannot breathe justiciability into their law suit by claiming economic injury from Ruocchio's suspension, removal and subsequent reinstatement as treasurer of the local union. The complaint's allegations relating to monetary damages are grounded on Ruocchio's suspension as an officer of the union, not as a member. We have held that "the LMRDA does not provide relief to a union officer for suspension as an officer, nor for loss of income resulting therefrom." *Harrison v. Local 54 of Amer. Fed'n of State, County & Mun. Employees, AFL-CIO*, 518 F.2d 1276, 1281 (3d Cir. 1975). *See also Martire v. Laborers' Local Union 1058*, 410 F.2d 32, 35 (3d Cir. 1969) ("In *Sheridan v. United Brotherhood of Carpenters*, 306 F.2d 152 ([3d Cir.] 1962) we held that . . . Title I of the LMRDA . . . [does not] afford [ ] a remedy to a business agent of a union who has been removed from his elected office prior to the expiration of his term, for the reason that '[i]t is the union-member relationship, not the union-officer or union-employee relationship, that is protected.' ").

III.

The majority believes that an amorphous "chilling effect" of Article 78 on Appellants' speech is sufficient to confer standing such that a justiciable controversy exists and in so doing, makes an assumption that standing in a First Amendment case is co-extensive with standing in a § 411(a)(2) claim. Although courts have looked to First Amendment cases for guidance in § 411(a)(2) cases, it is clear that the two are not co-extensive. *United Steelworkers of America v. Sadlowski*, 457 U.S. 102, 111 (1982) ("However, there is absolutely no indication that Congress intended the scope of § 101(a)(2) to be identical to the scope of the First Amendment. Rather, Congress' decision to include a proviso covering 'reasonable' rules refutes that proposition."). Because the First Amendment provides broader protection of speech rights, there is no reason to assume that standing requirements in § 411(a)(2) cases are equivalent to those required to seek First Amendment relief. Indeed, ruling case law indicates that the exact reverse is true.

Notwithstanding the slightly broader concepts of standing in a First Amendment context, there are clear limits to what non-economic injury is sufficient to confer standing in a complaint brought under § 411(a)(2). Section 411(a)(2) itself provides one such limit:

> Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting,

> subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided* That *nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution* and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

29 U.S.C. § 411(a)(2) (emphasis added). The legislative history indicates that the provision that

> preserves the union's right to adopt reasonable rules governing the responsibilities of its members . . . was designed to remove "the extremes raised by the [freedom of speech and assembly provisions]" . . . and to assure that the amendment would not "unduly harass and obstruct legitimate unionism."

United Steelworkers of America, 457 U.S. at 110 (quoting 105 Cong. Rec. 6721, 6722 (1959) (statements of Sen. Cooper and Sen. Church)). Thus, we must determine whether Article 78 qualifies as one of the permitted "reasonable rules" under § 411(a)(2). If it is a reasonable rule, there is no justiciable controversy in this case.

A.

"Congress adopted the freedom of speech and assembly provision [of the LMRDA] in order to promote union democracy." *Id.* at 112. To understand the breadth of *union* democracy, we must ascertain the limitations to speech in the broader community in which we live, under

a *political* democracy. Because the First Amendment provides greater protection for speech, any limitation of its protection applies *a fortiori* to the protections of § 411(a)(2).

Even under the broader limitations of the First Amendment, our speech is restricted by the law of defamation and the criminal statutes that proscribe or punish lying under oath. The law of defamation, for example, imposes liability for any statement that "asserts or implies a statement of fact which is damaging to reputation." *Sedore v. Recorder Publishing Co.*, 716 A.2d 1196, 1200 (N.J. Super. Ct. App. Div. 1998); *see also Sisler v. Gannett Co., Inc.*, 516 A.2d 1083, 1086-1088 (N.J. 1986) (discussing cases that "attempt to pacify the warring interests of free speech and individual reputation"). Numerous state and federal laws prohibit the making of false statements under oath, "under penalty" or to law enforcement officers. *See, e.g.*, 18 U.S.C. § 1621 (perjury); 18 U.S.C. § 1623 (false declarations before grand jury or court); N.J. Stat. Ann. § 2C:28-1 (perjury); N.J. Stat. Ann. § 2C:28-2 (false swearing); N.J. Stat. Ann. § 2C:28-3 (unsworn falsification to authorities); N.J. Stat. Ann. § 2C:28-4 (false reports to law enforcement authorities).

Whatever have been the recent efforts in some quarters to denigrate the importance of telling the truth, society still places a premium on truth-telling and a penalty for violating the precepts prohibiting lying under oath. Even the President of the United States is not immune from such penalties. *See Jones v. Clinton*, 36 F. Supp.2d 1118, 1130, 1131 (E.D. Ark. 1999) (adjudging the President to be in civil contempt because his "deposition testimony regarding whether he had ever been alone with Ms.

Lewinsky was intentionally false, and his statements regarding whether he had ever engaged in sexual relations with Ms. Lewinsky likewise were intentionally false, notwithstanding tortured definitions and interpretations of the term 'sexual relations.' ").

Deliberately telling a lie or circularizing an untruth in the general community is neither protected nor acceptable in our society:

> [T]he use of the known lie as a [political] tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. . . . [T]he knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.

Garrison v. State of Louisiana, 379 U.S. 64, 75 (1964). Even in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and its progeny in actions against public officials, the First Amendment does not shield the publication of defamatory falsehood made " 'with actual malice' – that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 280.

B.

In the context of Article 78, "willfully," in the sense of intentionally or knowingly, is equivalent to the "actual malice" definition in *New York Times Co. v. Sullivan*. Because the First Amendment does not insulate a public official from making a statement with knowledge that it is false, there can be no doubt that § 411(a)(2) does not

protect a union member from the consequences of his own willful circularization of untrue statements. Thus, a union rule restricting this practice cannot be considered unreasonable. *Cf. Linn v. United Plant Guard Workers of America, Local 114*, 383 U.S. 53, 55 (1966) (determining that, in the context of national labor policy, a district court has jurisdiction to entertain a civil action for libel instituted under state law by a party to a labor dispute).

The fundamental purpose of labor unions also supports the reasonableness of Article 78. Implicit in all phases of labor organizations is the hallowed workers' proclamation "In union there is strength." The keystone of our national labor policy was articulated in the National Labor Relations Act of July 5, 1935, ch. 372, § 1, 49 Stat. 449 (the "Wagner Labor Act"), and repeated verbatim in the Labor Management Relations Act, 1947, 29 U.S.C. § 141 et seq.:

> It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.[14]

---

[14] National labor policy was first announced in the National Industrial Recovery Act of 1933:

> Sec.7. (a) Every code of fair competition, agreement, and license approved, prescribed, or issued under

29 U.S.C. § 151. The Wagner Labor Act also stated:

> The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wages rates and working conditions within and between industries.

Ch. 372, § 1, 49 Stat. 449. Finally, the Labor Management Relations Act states:

> this title shall contain the following conditions: (1) That employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; (2) that no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing; and (3) that employers shall comply with the maximum hours of labor, minimum rates of pay, and other conditions of employment, approved or prescribed by the President.

National Industrial Recovery Act of 1933, ch. 90, § 7(a), 48 Stat.195, 198 (1933) (held invalid by *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)).

> Experience has proved that protection by law of the right of employees to organize and bargain collectively . . . restor[es] equality of bargaining power between employers and employees.

29 U.S.C. § 151. Thus, we must recognize that the fundamental purpose of the United Transportation Union Local # 60 was to permit members to organize and bargain collectively for terms and conditions of employment in order to offset the economic, social and political power of employers.

In sensitive collective bargaining with employers and in processing grievances, the unified front of the union is of paramount importance. It is therefore a desirable objective to promote harmony and minimize acrimony within the ranks. A union is not an academic debating society; it is a formal democratic association of fellow workers founded to implement the "practice and procedure of collective bargaining." 29 U.S.C. § 151; Wagner Labor Act, ch. 372, § 1, 47 Stat. 449.

The prohibition of the commission of deliberate falsehoods by one union member against another helps to insure maximum harmony and thus to produce unity within the union. It serves the salutary purpose of minimizing dissension, disharmony and internal conflict within a labor organization whose effectiveness in bargaining collectively or processing grievances is calculated on unity of action. Article 78, exactly this type of prohibition, therefore implements the aims and objectives of labor unions as protected by precepts of a national labor policy in force for well over half a century.

To suggest as do the Appellants that Article 78 is illegal on its face is a concept that flouts the basic precepts of organized labor and free speech rights. To encourage willful circulation of untrue statements within a union is to generate dissension and disharmony within the union's rank and file, weaken the union's effectiveness and play into the hands of those segments of society that have steadfastly opposed and battled the legitimacy of organized labor and collective bargaining, all of which have been hallmarks of our national labor policy at least since 1933 and 1935.

Accordingly, I would hold as a matter of law that Article 78 is one of the "reasonable rules" that a union may adopt in accordance with § 411(a)(2). Thus, in my view, any nebulous, so-called chilling effect of Article 78 is insufficient to create a justiciable controversy.

IV.

The majority determines that certain precedents of this court dictate that Appellants' case is still alive because Appellants asserted declaratory and equitable claims in addition to their claims for monetary relief. *See* Maj. Op. at 11 ("[W]e view our decisions in *Mallick v. International Brotherhood of Electrical Workers*, 644 F.2d 228 (3d Cir. 1981) and *Semancik v. United Mine Workers of America District #5*, 466 F.2d 144 (3d Cir. 1972) as requiring that his claim for declaratory and injunctive relief be heard."). An examination of these cases indicates that they constitute no meaningful authority for the majority's attempt to breathe life into this moribund case.

A.

In *Mallick*, we determined that "[h]arm to free speech rights . . . is not measured solely in economic terms, nor must concrete punishment be meted out to confer standing to sue." 644 F.2d at 235. We then explained: "The right to speak one's views is so fundamental that the spectre of punishment, or the uncertainty created by a vaguely worded prohibition of speech, is injurious as well." *Id.*

In discussing *Mallick*, the majority states:

> We noted that the mere fact that the members were charged, as well as the possibility of future charges based on the challenged prohibitions, could have a substantial chilling effect on plaintiffs' and other union members' exercise of their free speech rights: "The goal of union democracy, achieved through the expression of opposing viewpoints, would be difficult to realize if members felt deterred from expressing their opinions by the prospect of disciplinary proceedings." [*Mallick*, 644 F.2d] at 236. Accordingly, we remanded for the district court to consider whether the provisions at issue violated § 411 of the LMRDA. *Id.*

Maj. Op. at 16. This intimates that the only injury suffered by the *Mallick* plaintiff union members was the chilling of their free speech rights. In fact, in *Mallick*, there was substantial economic injury averred as well as "the spectre of punishment" for engaging in protected activity. For example, the *Mallick* plaintiffs alleged harassment for talking to newsmen and communicating with the National Labor Relations Board, Congressmen and Labor Department officials. They also claimed retaliation by the union in the form of less desirable job assignments. We

stated that "[t]hese claims of emotional distress and economic injury were deemed sufficient to support damage awards by the jury, and they confer standing to challenge the validity of a union constitution which was invoked to punish them for protected conduct." *Mallick*, 644 F.2d at 236.

Here, by contrast, there are no allegations of economic injury *qua* membership in the union. The allegations of injury are insufficient to satisfy even the lenient requirements of standing for a § 411(a)(2) claim. There was only one charge brought against Ruocchio and, as detailed in great length above, *see supra* Part III, it was for unprotected speech. *See Linn*, 383 U.S. at 63 ("[T]he most repulsive speech enjoys immunity *provided it falls short of a deliberate or reckless untruth.*") (emphasis added); *Garrison*, 379 U.S. at 75 ("[T]he knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection."); *New York Times*, 376 U.S. at 279-280 (holding that the First Amendment does not shield the publication of defamatory falsehood made with actual malice). Ruocchio's temporary removal from office, and any economic loss he suffered as an *officer* is not an injury that may be recouped under the LMRDA and thus is also insufficient to confer standing. *Harrison*, 518 F.2d at 1281. The only remaining allegation of injury is Appellants' assertion that their speech has been "chilled." To consider this bald allegation sufficient to confer standing under the LMRDA is to eviscerate the entire concept of standing in the free speech context.

The majority believes that the material facts of this case and those of *Mallick* are identical or substantially similar. This suggestion does not reflect the complete

material or adjudicative facts in that case. As stated above, the *Mallick* plaintiffs were charged for clearly protected activity and received less desirable job assignments.

> A judicial precedent attaches a specific legal consequence to a detailed set of facts in an adjudged case or judicial decision, which is then considered as furnishing the rule for the determination of a subsequent case involving *identical or similar material* facts and arising in the same court or a lower court in the judicial hierarchy.

Allegheny General Hospital v. Nat'l Labor Relations Bd., 608 F.2d 965, 969-970 (3d Cir. 1979) (footnote omitted and emphasis added). *Mallick* does not qualify as a legal precedent for this case because the basic differences in material or adjudicative facts outweigh the resemblances to qualify it as a proper analogy.

B.

Nor may Appellants find support in the teachings of *Semancik*. At issue in *Semancik* was Article X, Section 10 of the United Mine Workers constitution, which provided in part:

> [A]ny member or members resorting to *dishonest or questionable practices* to secure the election or defeat of any candidate for district office shall be tried by the district executive board and fined, suspended or expelled as the magnitude of the transgression may warrant.

See Semancik, 466 F.2d at 147 (emphasis added). We held that Section 10 "presents a threat and obstacle to free

speech because it is so vague and ill-defined that whenever a union member might exercise the right guaranteed to him under the LMRDA, he is in peril of violating the provision. In response to such a union rule, a reasonable man might well refrain from taking full advantage of his rights." *Id.* at 153-154.

I am unwilling to equate the "vague and ill-defined" Section 10 with the clear and unambiguous terms of Article 78, which prescribes penalties for any member who "willfully circularizes untrue statements." The average union member would certainly understand what is meant by "untrue statements" or "circularizes." This is a far cry from the obtuse expressions in *Semancik*: "dishonest or questionable practices." Nor can we fault the use of the word "willfully," in the sense that this means intentionally or knowingly as distinguished from accidentally or negligently. Were we to hold otherwise, hundreds of federal criminal statutes in Title 18 of the United States Code would suffer the same lethal fate. I therefore have no difficulty in distinguishing Article 78 in this union's constitution from the condemned Article X, Section 10 in the United Mine Workers constitution in *Semancik*.

Nor does the following portion of the *Semancik* opinion, relied upon by the majority, give effective support to its theory:

> [C]ourts have responded by making clear that labor organizations properly exercise their disciplinary powers only over a limited area of proscribed conduct inimical to the union as an entity and the collective bargaining mechanism. Unless statements fall into these categories, they are protected from union action even if libelous.

Id. at 153, *quoted in* Maj. Op. at 17. Consistent with *Semancik*, Article 78 does prohibit "conduct inimical to the union as an entity and the collective bargaining mechanism." As stated in detail above, *see supra* Part III, the mantra of organized labor is "In union, there is strength." By proscribing the willful circularizing of untrue statements, Article 78 serves that purpose by minimizing acrimony and promoting harmony within the ranks.

Moreover, notwithstanding the quoted language of *Semancik*, the reference that statements of union members are protected from union action "even if libelous" is simply not a correct statement of ruling Supreme Court case law. This proposition flies in the face of the unambiguous holding of the Court in *Linn*:

> [T]he most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth. But it must be emphasized that malicious libel enjoys no constitutional protection in any context. After all, the labor movement has grown up and must assume ordinary responsibilities. *The malicious utterance of defamatory statements in any form cannot be condoned, and unions should adopt procedures calculated to prevent such abuses.*

383 U.S. at 63 (emphasis added). Accordingly, the teachings of *Semancik* do not support the existence of a justiciable controversy in this case.

C.

Therefore, the two major cases that form the linchpin of the majority's opinion do not support their conclusions. Moreover, acceptance of the notion that any union

member who is charged with violating Article 78 – without proof of actual financial injury or of the deprivation of the right to vote, to discuss union matters or to hold office – may bring an action in federal court to challenge the legality of the Article will generate a state of labor union disruption that will hail unions, their members and their officers into federal court every time *any* disciplinary rule of a union is invoked by a member, officer or committee against another, under the guise that merely initiating an internal union proceeding, in and of itself, violates a member's "right to meet and assemble freely." This certainly does not promote union democracy, nor does it promote unity and harmony within the rank and file. Although I am absolutely convinced that my distinguished colleagues certainly did not so intend, the effect of their holding is to weaken and undermine labor union effectiveness as envisioned and protected by our national labor policy.

V.

In sum, the abstract injury asserted by the Appellants – the right to be free from any application of Article 78 to them – does not meet the threshold requirement that "[a] plaintiff must always have suffered a distinct and palpable injury to himself that is likely to be redressed if the requested relief is granted." *Gladstone, Realtors,* 441 U.S. at 100 (internal citations and quotations omitted).

Because Article 78 is reasonable as a matter of law, it is impossible to discern how Appellants sustained the necessary injury entitling them to an injunction restraining the future operation of the article. Appellants were

not prevented from criticizing union policies or from mounting effective challenges to union leadership. They were not denied an opportunity to work. They were not denied the opportunity to express any views, arguments or opinions or to express at all meetings of the labor organizations their views of candidates in an election of the labor organization or of any business properly before the meeting.

Rather, Ruocchio was precluded only from "willfully circularizing untrue statements." As punishment for his alleged violation of Article 78, he was not expelled from membership; he was denied only the opportunity, for several months, to exercise his office as treasurer. On appeal after trial, he was restored to his office with all full privileges and rights. The only injury he sustained was his temporary removal from office. Because this was an injury as an officer and not as a member, the LMRDA does not afford relief.

Accordingly, I dissent and would affirm the judgment of the district court for the foregoing reasons.

A True Copy:

Teste:

Clerk of the United States
Court of Appeals for
The Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 98-6281 & 98-6363

EUGENE RUOCCHIO;
ROBERT A. D'ANGIOLILLO,

Appellants

v.

UNITED TRANSPORTATION UNION, LOCAL 60;
DONALD J. BOGEN (Dan);
UNITED TRANSPORTATION UNION

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil No. 97-cv-5732)
(District Court Judge: Honorable Nicholas H. Politan)

Present: Stapleton, Rendell, and Aldisert, *Circuit Judges*

JUDGMENT

These causes came on to be heard on the record from the United States District Court for the District of New Jersey and were argued by counsel on March 2, 1999.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered July 9, 1998 for which reconsideration was denied on August 3, 1998, be and the same, is

hereby reversed. The order entered September 14, 1998 is hereby vacated. The cause is remanded to the District Court for further proceedings consistent with the opinion of this Court. Each party to bear its own costs. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ P. Douglas Sisk
Clerk

Dated: June 23, 1999

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CHAMBERS
NICHOLAS H. POLITAN
DISTRICT JUDGE

(Filed Mar. 2, 1998)

LETTER ORDER
ORIGINAL ON FILE WITH THE CLERK OF THE COURT

March 3, 1998

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Attorneys for Defendant
United Transportation Union

Re: Eugene Ruocchio and Robert D'Angiollillo v. United Transportation Union, Donald Bogen, and United Transportation Union, Local 60 Civil Action No. 97-5732 (NHP)

Dear Counsel:

This matter comes before the Court on the motion of defendant United Transportation Union ("UTU"), Donald Bogen ("Bogen"), and United Transportation Union,

Local 60 ("Local 60"), which seek to dismiss the application of plaintiff, Eugene Ruocchio ("Ruocchio"), for a preliminary injunction. The Court heard oral argument in this matter on February 4, 1998. As more fully set forth below, defendants' motion to dismiss plaintiff's application for a preliminary injunction is **GRANTED**, but the Court will retain jurisdiction of this matter pending the outcome of the internal union trial.

Local 60 represents trainmen employed by New Jersey Transit Rail Operations and is headquartered in Summit, New Jersey. The headquarters were formerly in Newark, New Jersey. After the office was moved, the moving company owed a refund to Local 60 for an overpayment. After being endorsed, the check was sent to plaintiff, who was the Treasurer for Local 60.

The original check was not accepted by the bank, so plaintiff demanded that another check be drawn and forwarded to him. The wife of plaintiff Bogen, who was General Chairperson for Local 60, requested another check from the moving company. This new check was then forwarded to plaintiff.

On September 15, 1997, plaintiff wrote to Vice General Chairperson R.B. Hicks about this check. The letter stated, in pertinent part:

> Finally, over a month ago I had received a refund check from the Vernay Company for which I returned as a result of it being rejected from the bank as a third party check. I have since received another check from the same company, however, the amount is drastically reduced with no explanation. Please advise why

this has happened and when I am to expect the additional monies owed to our members.

At a meeting subsequent to this letter, President Padelski requested a retraction letter from plaintiff, as he was clearly in error. Plaintiff agreed to do so, but when he failed to provide one, Bogen filed internal charges against plaintiff under Article 78 for willfully circulating untrue statements.

The Local, by vote, authorized a trial, elected a trial board, and removed plaintiff from his office as Treasurer pending the outcome of the trial board.

Article 78 of the UTU Constitution provides, in part, that a member who "willfully circularizes untrue statements shall be expelled from membership . . . if, after being charged and tried under the trial provisions of this Constitution, his/her guilt has been established." Union Constitution, attached as Exhibit 14 to Defendants' Memorandum.

The Court will not interfere with the internal workings of the Union at this point in time. *See Harris v. Int'l Longshoremen's Assoc.*, 321 F.2d 801 (3d Cir. 1963). The Court will retain jurisdiction, however, pending the resolution of plaintiff's trial. Though not making a determination one way or the other at this time, the Court is compelled to note that it has serious reservations as to the validity of Article 78.

Therefore, defendants' motion to dismiss the application for preliminary injunction is **GRANTED**, but the

Court will retain jurisdiction in this matter pending the resolution of the internal Union trial.

SO ORDERED:

/s/ Nicholas H. Politan
NICHOLAS H. POLITAN, U.S.D.J.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

EUGENE RUOCCHIO, et al., Plaintiffs, v. UNITED TRANSPORTATION UNION, et al., Defendants.	CIVIL ACTION NO. 97-5732 HON. NICHOLAS H. POLITAN **FINAL ORDER** (Filed Jul. 8, 1998)

This matter having come before the Court on the renewed motion for a preliminary injunction and for summary judgment by plaintiffs, Eugene Ruocchio and Robert D'Angiollillo; and the Court having decided the matter without oral argument, pursuant to Federal Rule of Civil Procedure 78; and the Court having determined that no case or controversy exists due to plaintiff Ruocchio's reinstatement to his position;

IT IS on this 8th day of July, 1998,

ORDERED that plaintiffs' Complaint be and hereby is **DISMISSED WITH PREJUDICE.**

/s/ Nicholas H. Politan
NICHOLAS H. POLITAN
U.S.D.J.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CHAMBERS OF
NICHOLAS H. POLITAN
JUDGE

(Filed Aug. 3, 1998)

NOT FOR PUBLICATION

July 30, 1998

LETTER ORDER
ORIGINAL ON FILE WITH CLERK OF THE COURT

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Attorneys for Defendants

Re: Eugene Ruocchio, et al. v. United Transportation Union Local 60, et al. Civil Action No. 97-5732 (NHP)

Dear Counsel:

This matter comes before the Court on the motion of plaintiff Eugene Ruocchio seeking reconsideration of this Court's July 9, 1998 Letter Opinion and Order dismissing plaintiff's Complaint. The matter was decided without oral argument, pursuant to Federal Rule of Civil Procedure 78. As set forth below, plaintiff's motion for reconsideration is **DENIED.**

DISCUSSION

In a motion for reconsideration, the movant must set forth concisely the "matters or controlling decisions which counsel believes the Court has overlooked." Local Civil Rule 7.1(g). "The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence." *Harsco v. Zlotnicki*, 779 F.2d 906, 909 (3d Cir. 1985), *cert. denied*, 476 U.S. 1171 (1986).

Because the Court is satisfied that its prior decision is correct and that there is no case or controversy remaining before the Court, and because plaintiff has not pointed to any errors of law or fact, plaintiff's motion is hereby **DENIED.**

SO ORDERED:

/s/ Nicholas H. Politan
NICHOLAS H. POLITAN
U.S.D.J.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CHAMBERS
NICHOLAS H. POLITAN (Filed Sept. 11, 1998)
DISTRICT JUDGE

LETTER ORDER
ORIGINAL ON FILE WITH THE CLERK OF THE COURT

September 9, 1998

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United Transportation Union

Re: Eugene Ruocchio and Robert D'Angiollillo
v. United Transportation Union, Donald Bogen,
and United Transportation Union, Local 60
Civil Action No. 97-5732 (NHP)

Dear Counsel:

This matter comes before the Court on plaintiff's application for an award of attorneys' fees. The Court

resolves this matter without oral argument pursuant to Rule 78. The motion is **DENIED** for the reasons explained below.

This Court's March 3, 1998 Letter Order stated that it "will not interfere with the internal workings of the Union at this point in time. The Court will retain jurisdiction, however, pending the resolution of plaintiff's [internal union] trial." (citation omitted). The Court denied plaintiff's motion for reargument on July 30, 1998.

It is therefore clear that plaintiff is not a prevailing party in this litigation. Rather, this Court abstained pending the conclusion an internal trial. Plaintiff's motion for an award of attorneys' fees must therefore be **DENIED**.

SO ORDERED:

/s/ Nicholas H. Politan
NICHOLAS H. POLITAN, U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 98-6281 & 98-6363

EUGENE RUOCCHIO;
ROBERT A. D'ANGIOLILLO,

Appellants

v.

UNITED TRANSPORTATION UNION, LOCAL 60;
DONALD J. BOGEN (Dan);
UNITED TRANSPORTATION UNION

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil No. 97-cv-5732)
(District Court Judge: Honorable Nicholas H. Politan)

Present: BECKER, *Chief Judge*, SLOVITER, MANSMANN, GREENBERG, SCIRICA, NYGAARD, ALITO, ROTH, McKEE, RENDELL, ALDISERT*, STAPLETON*, *Circuit Judges*

SUR PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

The petition for rehearing filed by appellant having been submitted to the judges who participated in the

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* The votes of Senior United States Circuit Judges Ruggero J. Aldisert and Walter K. Stapleton are limited to panel rehearing only.

decision of this court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is DENIED. Judge Becker would have granted rehearing.

BY THE COURT:

/s/ Illegible
Circuit Judge

Dated: Aug 16 1999

LD/cc: ALF
KCB✓
TRH

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

CASE NOS. 98-6281 and 98-6363

EUGENE RUOCCHIO,
and
ROBERT D'ANGIOLLILLO,

Appellants

vs.

UNITED TRANSPORTATION UNION,
DONALD BOGEN, and
UNITED TRANSPORTATION UNION LOCAL 60,

Appellees.

Appeal from the United States District Court
for the District of New Jersey
U.S. District Judge Nicholas H. Politan

APPELLEES' BRIEF

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December 23, 1998

ATTORNEY FOR
UNITED TRANSPORTATION UNION

* * *

1998 order on October 15, 1998 (J.A. at 73).

IV. STATEMENT OF FACTS

UTU Local 60 represents trainmen employed by New Jersey Transit Rail Operations and is now headquartered in Summit, New Jersey (S.A. at 2). Local 60 is headed by General Chairperson Dan Bogen (J.A. at 18-19). In February 1997, the Local moved its headquarters from Newark, New Jersey to Summit, New Jersey (*Id.* at 9). The office secretary, Susan Bogen, wife of Dan Bogen, made arrangements with a moving company, Vernay Hauling, to conduct this move (*Id.*). The price quote was $125.00 per hour and the estimated time to complete the move was 10 hours (*Id.*). According to the arrangement, a check for $1,250.00 was paid to the moving company prior to the move. The completed move however, only took nine hours (*Id.*). The moving company refunded $125.00 by check made out to Mrs. Bogen (*Id.* at 19-20). Mrs. Bogen endorsed the check and forwarded it to Local President Steven Padelski (*Id.* at 19; S.A. at 2). Mr. Padelski then gave the check, to Mr. Ruocchio, who was Treasurer for Local 60, to deposit (S.A. at 2).

By letter dated July 9, 1997, Mr. Ruocchio returned the check to Mr. Padelski, claiming that the bank would not accept such a check, and demanded that another check, made out to Local 60, be obtained (J.A. at 21).

Only July 28, 1997, Mrs. Bogen returned the check to the moving company and requested another check, this one made out to Local 60 (J.A. at 19, 22). The moving company then issued another check in the amount of $125.00 (*Id.* at 19, 23). This check was forwarded to Mr.

Ruocchio who deposited it in Local 60's account (*Id.* at 19).

On September 15, 1997, Mr. Ruocchio wrote to Vice General Chairperson R. B. Hicks concerning this check (J.A. at 27). Despite the fact that the checks were for the exact same amount, and for reasons only known to himself, he stated, in pertinent part:

> Finally, over a month ago I had received a refund check from the Vernay Company for which I returned as a result of it being rejected from the bank as a third party check. *I have since received another check from the same company, however, the amount is drastically reduced with no explanation.* Please advise why this has happened and when I am to expect the additional monies owed to our members.

(Emphasis added) (*Id.*). This letter was also sent to President Padelski and Secretary Walsh. (*Id.*) During the September 28, 1997 meeting, this discrepancy was raised. President Padelski requested a retraction letter from Mr. Ruocchio as he was clearly in error. Mr. Ruocchio agreed to present a retraction. (*Id.* at 28). When no retraction came, Chairperson Bogen, by letter dated October 14, 1997, filed internal charges against Mr. Ruocchio under Article 78[2] for *willfully* circulating *untrue* statements. (*Id.* at 30) Pursuant

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[2] The text of Article 78 is set out in full at J.A. 39.

(2)

Supreme Court, U.S.
FILED
DEC 30 1999
CLERK

No. 99-810

IN THE
SUPREME COURT OF THE UNITED STATES

UNITED TRANSPORTATION UNION,
LOCAL 60, and DONALD J. BOGEN,

Petitioners,

v.

EUGENE RUOCCHIO, and
ROBERT A. D'ANGIOLILLO,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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December 30, 1999

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QUESTIONS PRESENTED

1. Whether the Court of Appeals properly concluded that the action was not moot in light of the unredressed claim for damages.

2. Whether, given that the LMRDA free speech issues presented by Petitioners have not yet been resolved by the lower courts, review of those issues would be premature.

3. Whether unions may lawfully discipline their members for allegedly false speech or whether the sole avenue for recourse is a civil action for defamation.

STATEMENT OF THE CASE

This controversy began when Eugene Ruocchio, an elected local union official, was charged by another union official, a political rival, with having violated Article 78 of the union's constitution which forbids members to "willfully circularize untrue statements" and mandates their expulsion if found guilty of doing so. Based on the filing of the charge, alone, Ruocchio was removed from his elective office pending trial.

Ruocchio and a fellow member and political supporter, Robert D'Angiolillo, then sued, *inter alia*, to enjoin Ruocchio's prosecution, to reinstate him, to obtain reimbursement of lost compensation, and to invalidate the challenged constitutional provision which had served as the predicate for his removal from office. The district court withheld relief pending exhaustion of the internal union disciplinary and appeal processes. However, when doing so, the court noted that "[t]hough not making a determination one way or the other at this time, the Court is compelled to note that it has serious reservations as to the validity of Article 78."

Months later, a local union trial committee found Ruocchio guilty. Subsequently, on appeal, the parent United Transportation Union ("UTU") overturned his conviction and ordered his reinstatement to office, seven months after his removal, and on the eve of having to respond to the plaintiffs' motion for summary judgment challenging its Constitution. The district court then summarily dismissed the action because, it concluded, Ruocchio's reinstatement rendered the entire case moot. A. 13, 50.

On appeal, the Third Circuit reversed because, *inter alia*, "there can be no question that Ruocchio's claim for monetary damages survives and is not moot." A. 13. In addition, the Circuit Court noted the many similarities between Ruocchio's case and *Mallick v. Int'l Bro. of*

Electrical Wkrs, 644 F.2d 228 (3rd Cir. 1981), and concluded that "[t]hese factors . . . lead us to the same conclusion that we reached in Mallick -- the District Court should have considered whether equitable and declaratory relief was appropriate" under the free speech guarantee of Title I, "Union Members Bill of Rights," of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"), 29 U.S.C. § 411(a)(2). A. 22. In doing so, the Court clarified that "[w]e do not decide whether Ruocchio is *entitled* to declaratory and injunctive *relief*; we hold only that the claims do have vitality before the District Court." A. 23 (emphasis in original).

Accordingly, the Circuit Court remanded for calculation and award, *inter alia*, of lost compensation and for determination whether Article 78 in the UTU Constitution infringes the free speech protection in LMRDA Title I, and for the award of appropriate relief in the event Article 78 were found to be unlawful. *See* 29 U.S.C. §§ 411(b), 412. The UTU then filed this Petition and persuaded the district court to stay further proceedings on remand pending its disposition.

REASONS FOR DENYING THE WRIT

I.

In its Petition for a Writ of Certiorari, the Union seeks to have this Court review the Circuit Court's discussion of the LMRDA's Title I free speech protection. At bottom, however, that discussion was mere *dictum* because the appellate court's *ratio decidendi* was that the case was not moot because requested relief, to which Ruocchio was entitled, had not been granted.[1] Accordingly, we respectfully

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[1] The Petition does not seek to have this Court review the mootness holding.

submit that it would be premature for this Court to review the appellate court's informal discussion of caselaw applicable to the Title I free speech rights of union members under the LMRDA until that caselaw has been definitively construed and applied to the facts of this case.

II.

In its Petition, the UTU contends that the Circuit Court's decision has drastically changed the equation for resolving free speech issues by suggesting that unions may not constitutionally forbid, and punish members for, defamatory speech. However, in a long and unbroken string of decisions, beginning with *Salzhandler v. Caputo*, 316 F.2d 445 (2d Cir.), *cert. denied*, 375 U.S. 946 (1963), the courts have uniformly held that LMRDA's Title I forbids unions to discipline members for their speech even if it is false, malicious, or libelous.[2] And in the decision below, the Third Circuit did no more than to recognize this body of caselaw and to remand this action to the district court to consider and apply it to the facts of this case.[3]

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[2] *See, e.g., Cole v. Hall*, 339 F.2d 881 (2d Cir. 1965); *Fulton Lodge, IAM v. Nix*, 415 F.2d 212 (5th Cir. 1969); *Semancik v. UMW*, 466 F.2d 144 (3rd Cir. 1972); *Keefe Bros. v. Teamsters Local 592*, 562 F.2d 298 (4th Cir. 1977); *Petramale v. Laborers Local 17*, 736 F.2d 13 (2d Cir. 1985); *Pearl v. Tarantola*, 361 F. Supp. 288, 292 (S.D.N.Y. 1973). *See also Kowaleviocz v. ILA Local 333*, 942 F.2d 285, 290 (4th Cir. 1991) (member may not be disciplined for profanity, "no matter how offensive"). It is this uniform and consistent body of law which the UTU seeks to have this Court overturn.

[3] The UTU's reliance on *Linn v. United Plant Guard Wkrs*, 383 U.S. 53 (1966), is misplaced. In *Linn*, this Court merely held that where either an employer or union circulates false and defamatory statements during a union-organizing campaign, the National Labor Relations Act does not bar the maintenance of a defamation action under state law provided the plaintiff pleads and proves the statements were made with malice. *See also* A-16, n.10.

III.

Lastly, the UTU contends in its Petition that the Circuit Court's discussion of Title I's free speech provision is contrary to *United Steelworkers v. Sadlowski*, 457 U.S. 102 (1982), where this Court upheld a union rule forbidding candidates for union office to accept contributions from nonmember "outsiders." In its opinion, the Court balanced the LMRDA's objective of fostering vigorous debate during union elections with the union's statutorily protected interest in preventing nonmembers from unduly influencing its internal union affairs. *Id.* at 115. When doing so, the Court noted that nonmember contributors possess no free speech right under the LMRDA. *Id.* at 113, n.6. And, while recognizing that the rule could have some impact on the scope of electoral debate, given that the Steelworkers "is a very large union whose members earn sufficient income to make campaign contributions," the Court determined that the impact would be minimal and accordingly found the rule to be reasonable. *Id.* at 114.

We submit that UTU is wildly off the mark when contending that: "analytically, *Sadlowski* and the present case are indistinguishable"; and, "Article 78 is no less a reasonable rule than that in *Sadlowski*." Petition at 11, 12. The UTU has not, and cannot, cite a countervailing, statutorily protected right or interest in prohibiting defamatory speech. To the contrary, as we have seen, the courts have uniformly held that the Title I "free speech" protection forbids unions to discipline members for speech, even when it is defamatory.

CONCLUSION

For the foregoing reasons, respondents respectfully submit that the UTU has come forward with virtually no reason to support its Petition for a Writ of Certiorari which should, accordingly, be denied.

Respectfully submitted,

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